

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON

Assigned on Briefs January 10, 2000

VELDORA L. TROUT v. STATE OF TENNESSEE

Direct Appeal from the Circuit Court for Hardin County
No. 7706PC C. Creed McGinley, Judge

No. W2000-00857-CCA-R3-PC - Filed April 9, 2001

The Petitioner was charged with the attempted first degree murder of her ex-fiancé. Tenn. Code Ann. § 39-12-107. In a negotiated plea agreement, the Petitioner accepted a fifteen-year sentence. The Petitioner subsequently filed a petition for post-conviction relief alleging ineffective assistance of counsel. The Petitioner's petition was subsequently heard and dismissed. This appeal followed, with the Petitioner setting forth three separate grounds upon which she contends that trial counsel was ineffective: (1) counsel failed to prepare an adequate defense; (2) counsel failed to investigate and highlight the past relationship between the victim and Petitioner; and (3) counsel failed to seek witnesses to support an insanity defense. After a thorough review of the record, we agree with the post-conviction court that the Petitioner received effective assistance of counsel. The post-conviction court's dismissal of the Petitioner's petition for post-conviction relief is affirmed.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

JOHN EVERETT WILLIAMS, J., delivered the opinion of the court, in which DAVID G. HAYES and ALAN E. GLENN, JJ., joined.

Chadwick G. Hunt, Savannah, Tennessee, for the appellant, Veldora L. Trout.

Paul G. Summers, Attorney General and Reporter; Lucian D. Geise, Assistant Attorney General; G. Robert Radford, District Attorney General; and John W. Overton, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

On June 1, 1998, the Petitioner, Veldora L. Trout, was arrested for the attempted first degree murder of her ex-fiance. The Petitioner was subsequently indicted by a Hardin County Grand Jury. On November 14, 1998, the Petitioner entered into a negotiated plea agreement and pled guilty to the charged offense. As a result of the negotiated plea agreement, the Petitioner received the minimum sentence of fifteen years. The Petitioner filed a petition for post-conviction relief on

September 17, 1999. A hearing on the Petitioner's petition was held on February 15, 2000, and the Petitioner's petition was dismissed on March 17, 2000. Notice of appeal was filed on April 6, 2000, and this appeal followed.

Facts

The facts set forth in the record in the instant case are not clear. However, the facts seem to be as follows. The Petitioner and victim were engaged and living in Alabama in 1995. According to the Petitioner, the relationship was turbulent, marred by physical abuse, mental abuse, and drug abuse. Regardless of the violent relationship between the two, however, the Petitioner and victim conceived two children together, one of which was miscarried.

Sometime in 1995, prior to the Petitioner giving birth to the victim's and Petitioner's child, the Petitioner and victim separated. The Petitioner moved to Ohio to be close to her family and the victim stayed in Alabama. The record indicates that the Petitioner and victim saw each other on a couple of occasions after the two separated. On one occasion in 1998, the Petitioner claims that the victim threatened to burn some place down. The exact circumstances surrounding this threat are unknown, however, the threat appears to be one of the events that lead to the Petitioner's ultimate decision to commit the violent act in the instant case.

On June 1, 1998, the Petitioner was engaged to a different man. The Petitioner's fiancé gave the Petitioner a ride to a nightclub. The Petitioner entered the nightclub where she saw the victim, Donnie Wilkerson, and called him out into the parking area. Once the two were in the parking area, the Petitioner took out a gun that she had brought with her and shot the victim four times. As a result, the victim is now paralyzed from the waist down.

After the shooting, witnesses found the Petitioner leaning over the victim's body. The same witnesses subdued the Petitioner until police could arrive. When police arrived, the Petitioner was asked where the gun was. The Petitioner told the police of the gun's location and was subsequently arrested.

Analysis

The Petitioner contends that counsel failed to prepare an adequate defense, and failed to investigate and highlight the past relationship between the victim and the Petitioner. These contentions are set forth in the wake of a negotiated guilty plea agreement. Therefore, it is in this vein that we examine these two contentions. The Petitioner also contends that counsel failed to seek witnesses to support an insanity defense. The last contention will be addressed separate from the first two.

A. Standard of Review

This court reviews a claim of ineffective assistance of counsel under the standards of Baxter v. Rose, 523 S.W.2d 930 (Tenn. 1975), and when it involves a plea of guilty under Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985). Under Baxter the Petitioner must show that the attorney's performance was deficient. Baxter, 523 S.W.2d at 936. Under Hill, the Supreme Court required a defendant to show that there is a reasonable probability that, but for counsel's errors, he would not have plead guilty and would have insisted on going to trial. 474 U.S. at 59, 106 S. Ct. at 370; Hicks v. State, 983 S.W.2d 240, 246 (Tenn. Crim. App. 1998). Thus, in the instant case, the Petitioner bears the burden of showing (1) that the attorney's performance was deficient, and (2) that, but for counsel's errors, she would not have plead guilty and would have insisted on going to trial.

The trial judge's findings of fact on post-conviction hearings are conclusive on appeal unless the evidence preponderates otherwise. State v. Burns, 6 S.W.3d 453, 461 (Tenn. 1999). The trial court's findings of fact are afforded the weight of a jury verdict, and this court is bound by the trial court's findings unless the evidence in the record preponderates against those findings. Henley v. State, 960 S.W.2d 572, 578 (Tenn. 1997); Alley v. State, 958 S.W.2d 138, 147 (Tenn. Crim. App. 1997). This court may not reweigh or reevaluate the evidence, nor substitute its inferences for those drawn by the trial judge. Henley, 960 S.W.2d at 578-79; Massey v. State, 929 S.W.2d 399, 403 (Tenn. Crim. App. 1996). Questions concerning the credibility of witnesses and the weight and value to be given to their testimony are resolved by the trial court, not this court. Burns, 6 S.W.3d at 461. The burden of establishing that the evidence preponderates otherwise is on the Petitioner. Henley, 960 S.W.2d at 579; Black, 794 S.W.2d at 755.

B. Issues Presented for Review

The Petitioner first argues that counsel failed to prepare an adequate defense for trial. Our review of the record, however, does not show this contention to be correct. The record clearly shows that the Petitioner was evaluated for a possible insanity defense. The evaluation set forth that such a defense would not stand the scrutiny of trial. The record also shows that the Petitioner was informed by trial counsel of the outcome of the psychological evaluation, and that trial counsel was willing to pursue an insanity defense at trial if the Petitioner wanted such a defense pursued. Further, trial counsel testified at the post-conviction hearing that he discussed other possible defenses with the Petitioner, including the defense of diminished capacity.

Testimony in the record showed that trial counsel informed the Petitioner of the sentencing offer made to the Petitioner in exchange for a guilty plea. The Petitioner testified that she was concerned about receiving a thirty-year sentence, indicating that this was part of the reason she accepted the guilty plea offer that was made to her. At the sentencing hearing the Petitioner indicated that it was her wish and desire to plead guilty to the crime, and was aware of what she was

doing. Further, the Petitioner stated at the sentencing hearing that she understood: the nature of the charge; the potential legal defenses that could have been raised on her behalf; and that counsel had “fully and thoroughly” discussed the case with her. These statements were followed by an admission of guilt and a guilty plea in exchange for a fifteen-year sentence. In light of the evidence presented at the post-conviction hearing, it is clear to this court that the Petitioner entered a guilty plea while being fully informed of the charges and potential defenses that were relevant in the instant case.

The Petitioner next contends that counsel failed to investigate and highlight the past relationship between the victim and the Petitioner. The Petitioner contends that such was important in order to “exploit this avenue of defense.” While the Petitioner sets forth: (1) allegations of physical and mental abuse by the victim while the two lived together, and (2) the fact that the victim and the Petitioner have a child together, the Petitioner fails to clarify for this court how such could come to bear on an “avenue of defense” for the Petitioner. This court will not speculate about arguments that fall squarely upon the shoulders of the Petitioner to develop.

Given the aforementioned facts and testimony that were presented at the post-conviction hearing, we can not conclude that counsel was deficient in his representation of the Petitioner. Further, we can not conclude that counsel made any errors in his representation that resulted in the Petitioner’s guilty plea. With regards to the first two contentions, the Petitioner has failed to carry the burden of establishing ineffective assistance of counsel as set forth under Strickland and Hill.

Discovery of Witnesses in Support of Petitioner’s Mental State

In addition to the two contentions set forth above, the Petitioner also contends that counsel should have sought witnesses to provide medical evidence in support of an insanity defense, but failed to seek to such evidence. We respectfully disagree

A. Standard of Review

“When a petitioner contends that trial counsel failed to discover, interview, or present witnesses in support of his defense, these witnesses should be presented by the petitioner at the evidentiary hearing.” Black v. State, 794 S.W.2d 752, 757 (Tenn. Crim. App. 1990); see also Scott v. State, 936 S.W.2d 271, 273 (Tenn. Crim. App. 1996). As a general rule, this is the only way the petitioner can establish that (1) a material witness existed who could have been discovered but for counsel’s negligent investigation of the case; (2) a known witness was not interviewed; (3) the failure to discover or interview the witness caused him prejudice; or (4) the failure to present a known witness or call the witness to the stand resulted in the denial of critical evidence which caused the petitioner prejudice. Black, 794 S.W.2d at 757. Neither the trial court nor this court can speculate on what a witness’ testimony might have been if introduced by counsel. Id.

B. Analysis

We begin this part of the analysis by again noting the psychological evaluation sought by counsel. Certainly such a medical evaluation was sought in an attempt to substantiate an insanity defense. Any further investigation on behalf of the Petitioner by counsel was cut short by the Petitioner's decision to enter into a negotiated plea agreement. Counsel was under no further obligation to seek additional evidence to substantiate an insanity defense once the Petitioner pled guilty. Further, we note that had further investigation in the instant case not been cut short by the Petitioner's decision to enter a guilty plea, counsel would have had several additional weeks to conduct the in-depth and thorough investigation that the Petitioner claims should have been done.

As set forth under the standard of review, the burden fell upon the Petitioner at the post-conviction hearing to present witnesses in order to show that: (1) a material witness existed who could have been discovered but for counsel's negligent investigation of the case; (2) a known witness was not interviewed; or (3) the failure to discover or interview the witness caused her prejudice.¹ At the post-conviction hearing, the Petitioner failed to present any witnesses to support her contention that medical evidence of her state of insanity was discoverable had counsel put forth an effort. Absent the presentation of any witnesses, neither the trial court nor this court are at liberty to speculate on what such a witness' testimony might have been if introduced by counsel. We conclude that the trial court was correct in failing to find ineffective assistance of counsel based upon this contention.

Findings of The Post-Conviction Court

In the post-conviction court's specific findings, the court found that the Petitioner's testimony revealed that the Petitioner was a "bright and articulate person capable of expressing herself." The post-conviction court also indicated that it considered the transcript of the guilty plea hearing and the testimony given at the post-conviction hearing regarding the same, and concluded that the Petitioner's guilty plea was made freely and voluntarily. The post-conviction court also found that the Petitioner feared receiving a much greater sentence than the sentence she was offered in exchange for a guilty plea. As the post-conviction court noted, it was not until after ten months of incarceration had passed that the Petitioner came to the conclusion that the plea offer was not in her best interest.

The post-conviction court also found that the mental evaluation that did not support an insanity defense preceded the Petitioner's guilty plea by less than a month. Certainly this forensic evidence, or lack thereof, played a key role in the Petitioner's decision to accept the guilty plea offer that was extended to her. Finally, the post-conviction court set forth that the Petitioner's counsel's actions were "certainly ... within the range of competence expected" and "in no way [were they]

¹The fourth factor does not apply to the instant case since the Petitioner pled guilty.

constitutionally deficient.” In support, the post-conviction court pointed out that counsel offered to go forward with any “legitimate defenses” defenses that the Petitioner desired, met with his client on several occasions, and conducted a “full and thorough discovery process.” After a thorough review of the record, we agree with the post-conviction court’s findings.

CONCLUSION

_____The post-conviction court was correct in finding that the Petitioner received effective assistance of counsel prior to, and up to, the time a guilty plea was entered in the instant case. Further, this court concludes that the Petitioner knowingly and voluntarily entered a guilty plea in her case after being fully informed of her rights. As has been set forth, the Petitioner received effective assistance of counsel and there is no claim presented for review that would make the Petitioner’s sentence “void or voidable [due to] the abridgment of any right guaranteed by the Constitution of Tennessee or the Constitution of the United States.” Tenn. Code Ann. § 40-30-203. The judgment of the trial court is affirmed.

JOHN EVERETT WILLIAMS, JUDGE